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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Bonnie Creech,

10 Plaintiff,

11 v.

12 Kind Lending LLC and John Claude  
13 Hegglin,

14 Defendants.

No. CV-22-00871-PHX-SMB

**ORDER**

15 Four Motions are pending before the Court. First, Defendant Kind Lending LLC's  
16 Motion to Dismiss (Doc. 70), to which Plaintiff Bonnie Creech filed a Response (Doc.  
17 72) and Kind Lending LLC filed a Reply (Doc. 74.) Second, Defendant John Claude  
18 Hegglin's Motion to Dismiss (Doc. 76). Plaintiff did not file a responsive brief, but  
19 instead filed the third Motion at issue—a Motion for Rule 60(B) Relief & Leave to  
20 Amend (Doc. 84). The fourth pending Motion is Hegglin's Motion for Rule 11 Sanctions  
21 (Doc. 75), to which Plaintiff filed a Response (Doc. 82) and Hegglin filed a Reply (Doc.  
22 86).

23 After reviewing the briefing and relevant law, the Court will grant Kind Lending's  
24 Motion to Dismiss, grant Hegglin's Motion to Dismiss, deny Plaintiff's Rule 60(B)  
25 Motion, and deny Hegglin's Motion for Rule 11 Sanctions.

26 **I. BACKGROUND**

27 The case centers around a loan to purchase a manufactured home in Kingman,  
28 Arizona. Plaintiff applied for a loan with Hegglin, who was working for Broker

1 Solutions, Inc. Plaintiff received a loan prequalification agreement on March 23, 2021  
2 that listed Barrett Financial Group, L.L.C. (“Barrett”) as the lender. She was prequalified  
3 for a \$148,437 loan with 3.375% interest over 30 years. Plaintiff found the manufactured  
4 home she wanted and made an offer which was accepted. She alleges that the appraisal  
5 report was not timely sent to her, and the sellers told her they could not wait any longer  
6 for her to buy the house. Plaintiff alleges that when she got the appraisal, the sellers  
7 agreed to decrease the price. After that, Hegglin sent various documents that changed the  
8 origination charge, included an Architectural and Engineering Fee that Plaintiff had  
9 already paid, and increased the mortgage insurance costs.

10 During closing, Plaintiff called Hegglin to ask about some of the changes. On the  
11 call, Hegglin also told Plaintiff that the home she was buying did not have a  
12 Manufactured Home (“MH”) Advantage sticker, which made her ineligible for the  
13 original loan, so he switched her to a different loan product with a higher Annual  
14 Percentage Rate. Plaintiff signed the closing documents on May 20, 2021, but the loan  
15 remained unfunded by May 25, 2021. As a result, Plaintiff had to pay for her parents to  
16 stay in a hotel while waiting for the loan to fund. She also suffered stress, anxiety, and  
17 loss of appetite because of the delays. On May 26, 2021, Plaintiff was presented with a  
18 third set of closing documents. These closing documents did not correct any of the  
19 previous errors, but she was forced to sign them to close and get her parents the housing  
20 they needed. Hegglin had promised to refund the engineering fee and promised that  
21 Plaintiff would not be charged a second \$250 mobile notary fee, but he did not follow  
22 through on these promises.

23 Following this Court’s dismissal of her First Amended Complaint (“FAC”),  
24 Plaintiff filed her Second Amended Complaint (“SAC”) alleging Truth in Lending Act  
25 (“TILA”) and Arizona Consumer Fraud Act (“ACFA”) violations. Defendants Barrett,  
26 Broker Solutions, and Kind Lending filed Motions to Dismiss, and Defendant Barrett  
27 filed a motion to strike portions of her SAC. The Court granted in part and denied in part  
28 Barrett’s Motion and granted both Broker Solutions and Kind Lending’s Motions to

Dismiss. (Doc. 66.) Plaintiff then filed her Third Amended Complaint (“TAC”), alleging a TILA violation against Hegglin and an ACFA violation against both Hegglin and Kind Lending. (Doc. 68.) Thereafter, Defendants Kind Lending and Hegglin filed the Motions to Dismiss now pending before the Court. (Doc. 70; Doc. 76.)

## II. LEGAL STANDARD

To survive a Federal Rule of Civil Procedure 12(b)(6) motion for failure to state a claim, a complaint must meet the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a “short and plain statement of the claim showing that the pleader is entitled to relief,” so that the defendant has “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This exists if the pleader sets forth “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

Dismissal under Rule 12(b)(6) “can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint that sets forth a cognizable legal theory will survive a motion to dismiss if it contains sufficient factual matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Plausibility does not equal “probability,” but requires “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). Moreover, a complaint is not a vehicle to facilitate fishing expeditions in hope that some fact supporting an allegation will be uncovered. *See Rodriguez v. Quality Loan Serv. Corp.*, No. CV-09-1853-PHX-FJM, 2010 WL 1644695, at \*2 (D. Ariz. Apr. 22, 2010).

In ruling on a Rule 12(b)(6) motion to dismiss, the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). However, legal conclusions couched as factual allegations are not given a presumption of truthfulness, and “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). A court ordinarily may not consider evidence outside the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *See United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). “A court may, however, consider materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment.” *Id.* at 908.

### **III. DISCUSSION**

#### **A. Kind Lending’s Motion to Dismiss**

Kind Lending moves to dismiss Plaintiff’s TAC on two bases: (1) Plaintiff has not plead an ACFA claim against Kind Lending; and (2) Plaintiff pleads deficient facts to show a plausible agency relationship between King Lending and Hegglin.

##### *1. Plaintiff’s Claim Against Kind Lending*

Kind Lending argues that Plaintiff has not asserted an ACFA against it, and therefore Count I of the TAC must be dismissed. (Doc. 70 at 6.) In response, Plaintiff contends that her factual allegations against Hegglin and Kind Lending substantiate facially valid independent and vicarious liability claims against Kind Lending. (Doc. 72 at 4.)

To state a claim under ACFA a plaintiff must show that there was “(1) a false promise or misrepresentation made in connection with sale or advertisement of merchandise, and (2) consequent and proximate injury.” *Stratton v. Am. Med. Sec., Inc.*, No. CV-07-1491-PHX-SMM, 2008 WL 2039313, at \*7 (D. Ariz. May 12, 2008). “[T]he misled consumer must have suffered some damage as a result of the misrepresentation.”

1 *Nataros v. Fine Arts Gallery of Scottsdale, Inc.*, 612 P.2d 500, 504 (Ariz. Ct. App. 1980)  
 2 (footnote omitted).

3 Plaintiff cites several paragraphs in her TAC that allegedly state an ACFA claim  
 4 against Kind Lending. (Doc. 72 at 4; Doc. 68 at 4 ¶¶ 7–10, 15 ¶ 79, 17 ¶¶ 91–93.)  
 5 Paragraphs 7–9 allege that the Massachusetts Division of Banks found Kind Lending  
 6 LLC and Broker Solutions dba Kind Lending to have entered into an agreement in  
 7 violation of the Massachusetts Consumer Fraud Act (the “Consent Orders”). In  
 8 paragraph 10, Plaintiff alleges that the NMLS number on her loan documents was not  
 9 Kind Lending LLC’s NMLS number. Paragraph 79 alleges that Chrissy Murphy, the  
 10 lender representative on the loan transaction disclosures, worked for both Broker  
 11 Solutions and Kind Lending during the loan transaction. Paragraphs 91–92 allege that  
 12 “Kind Lending, LLC through Hegglin” violated the ACFA by “failing to timely disclose  
 13 the increased cost of the loan” and “fail[ing] in its duty of acer by misrepresenting or  
 14 willfully failing to disclose . . . material disclosures for the Loan Transaction.”

15 The Court does not find these allegations sufficient to state a direct claim against  
 16 Kind Lending under the ACFA. First, Exhibit 5 attached to the TAC shows that Murphy  
 17 left Broker Solutions in October 2021 and began working at Kind Lending that same  
 18 month. (Doc. 68-1 at 33.) The May 2021 loan disclosures only identify Murphy as a  
 19 point of contact for Broker Solutions. (Doc. 35-1 at 39.) Thus, the record belies  
 20 Plaintiff’s contention that Murphy was employed at both companies during the loan  
 21 transaction. Moreover, the Consent Orders found that Kind Lending LLC engaged in  
 22 activities that the Division of Banks “believe[d] w[ere] misleading or had the ability or  
 23 capacity to mislead consumers into thinking that the Entity and Kind Lending were not  
 24 separate and distinct companies.” (Doc. 68-1 at 14.) In this case, the Note, Deed of  
 25 Trust, Manufactured Home Rider, and loan disclosure listed “Broker Solutions, Inc. dba  
 26 Kind Lending” as the creditor, (Doc. 35-1 at 2, 5, 19, 21, 32, 34–35, 39), and lists a  
 27 NMLS number not belonging to Kind Lending LLC. (See Doc. 68 at 4 ¶ 10.) And, in  
 28 Plaintiff’s own words, her AFCA claim against Kind Lending is brought based on

1 Hegglin’s conduct, not Kind Lending’s. (*Id.* at 17 ¶ 91.) Plaintiff does not express, or  
 2 reasonably imply, that her ACFA claim is directed against Kind Lending independent of  
 3 Hegglin’s actions throughout the loan transaction.

4 Plaintiff’s Complaints have not been paragons of clarity. Indeed, reading the TAC  
 5 while assuming all well-plead are true still shows nothing more than “naked assertions”  
 6 about Kind Lending’s direct violation of the ACFA. *Iqbal*, 556 U.S. at 678. As  
 7 discussed below, this issue is only addled by Plaintiff’s attempts to employ a backwards  
 8 theory of apparent agency. And, notably, Plaintiff concedes that she cannot “fully and  
 9 accurately allege the facts of the case” without first conducting discovery. (Doc. 72 at 4.)  
 10 Rule 8 requires Plaintiff to plead “enough facts to state a claim to relief that is plausible  
 11 on its face.” *Twombly*, 550 U.S. at 570. She cannot use discovery to conduct a “fishing  
 12 expedition” to potentially uncover facts supporting her allegations. *See Rodriguez*, 2010  
 13 WL 1644695, at \*2. The Court ultimately finds that Plaintiff has failed to assert an  
 14 ACFA claim specifically against Kind Lending LLC.

## 15 2. Agency and Joint Venture Theories

16 Kind Lending argues that it did not make any representations to Plaintiff that  
 17 would cause her to believe that Hegglin was its agent. (Doc. 70 at 6–8.) In response,  
 18 Plaintiff contends that an email from a “Kind Lending” email address instructing her to  
 19 contact Hegglin amounted to King Lending representing that Hegglin was its agent.  
 20 (Doc. 72 at 5.)

21 Under Arizona law, to adequately plead vicarious liability under a theory of  
 22 agency a plaintiff must show that the principal’s conduct allowed a third-party to  
 23 reasonably conclude that an agent was authorized to make representations on behalf of  
 24 the principal. *See Miller v. Mason-McDuffie Co. of S. Calif.*, 739 P.2d 806, 810 (Ariz.  
 25 1987). Importantly, apparent agency cannot be established by brand signage alone. *Am.*  
 26 *Motor Sales Corp. v. Sup. Ct.*, 494 P.2d 394, 396–97 (Ariz. Ct. App. 1972) (automobile  
 27 dealer agreements, advertising, and stationary not indicia of agency); *Colson v. Maghami*,  
 28 No. CV 08-2150-PHX-MHM, 2010 WL 2744682, \*12–13 (D. Ariz. July 9, 2010)

1 (finding no apparent agency where a plaintiff relied on brand signage and a principal  
2 never directly told plaintiff about agent authority); *see also Ocana v. Ford Motor Co.*,  
3 992 So. 2d 319, 326–27 (Fl. Dist. Ct. App. 2008) (allowing a dealer to “hold itself out” as  
4 authorized dealer, displaying Ford logos and other advertising, providing warranty, and  
5 training personnel insufficient to establish agency).

6 Previously, the Court found that Plaintiff had failed to plead an agency  
7 relationship where “the only allegation made in the SAC to support agency is that the  
8 loan documents ‘and elsewhere’ represented that Hegglin acted on behalf of Broker  
9 Solutions ‘which were apparent representations for Kind Lending LLC.’” (Doc. 66 at 11  
10 (quoting Doc. 52 at 6 ¶ 24).) This finding, in part, rested upon the Court’s determination  
11 that Broker Solutions dba Kind Lending and Kind Lending LLC are separate entities.  
12 (See Doc. 66 at 11.) Now, Plaintiff’s TAC attempts to cast doubt on that determination.  
13 Relying on the Consent Orders, Plaintiff alleges that because Kind Lending’s brand  
14 appeared alongside Broker Solutions NMLS number, “the public could not separate and  
15 understand they were distinct companies.” (Doc. 68 at 4 ¶¶ 9–10; *see* Doc. 68-1.)  
16 Altering the Court’s finding is not the boon Plaintiff believes it to be. If the Court found  
17 that, like in the Consent Orders, the public could not separate and understand that the two  
18 were distinct companies, it would not change the legal requirement for apparent  
19 agency—Kind Lending must have made a representation to Plaintiff that Hegglin was its  
20 agent. Plaintiff’s TAC belies this necessary fact wherein she alleges that Hegglin, an  
21 employee of Broker Solutions dba Kind Lending, emailed her from  
22 “LoanDocs@KindLending.com.” (Doc. 68 at 4–5 ¶ 11; Doc. 68-1 at 28.) Hegglin  
23 emailing Plaintiff directly does not equate to Kind Lending, as the alleged principal,  
24 representing to Plaintiff that Hegglin was its agent. To be sure, confusion may exist  
25 because Broker Solutions used a “KindLending.com” email address, however, it still does  
26 not show that Kind Lending made representations to Plaintiff regarding any of agency  
27 relationships.

28 At bottom, although Plaintiff’s allegations question the nature of Kind Lending



1 LLC and Broker Solutions dba Kind Lending’s relationship, there are insufficient facts  
 2 plead to show that Kind Lending LLC made the required direct representations to  
 3 Plaintiff that Hegglin was its agent. (*See e.g., id.* at 4–5 ¶ 11; 6–7 ¶¶ 25–28; 17 ¶¶ 91–  
 4 92.)<sup>1</sup>

5 Kind Lending also argues that Plaintiff’s joint venture claim fails as a matter of  
 6 law because it is not an independent cause of action. (Doc. 70 at 8–9.) And, even if it  
 7 were a valid cause of action, Kind Lending posits that Plaintiff has failed to set forth facts  
 8 in her TAC demonstrating the required elements. (*Id.*) In response, Plaintiff seemingly  
 9 concedes that joint venture is not an independent cause of action, but otherwise contends  
 10 that she has sufficiently plead all required elements. (Doc. 72 at 7.)

11 A joint venture is a theory of liability, not a separate legal claim. *See Griffin*  
 12 *Aerosat USA*, No. 2:10-cv-01838 JWS, 2010 WL 4580192, at \*6 (D. Ariz. Nov. 2, 2010).  
 13 The elements of a joint venture include “(1) an agreement, (2) a common purpose, (3) a  
 14 community of interest, (4) an equal right of control, and (5) participation in profits and  
 15 losses.” *Hernandez-Wheeler v. Flavio*, 930 P.2d 1309, 1312 (Ariz. 1997). Additionally,  
 16 to rely on a joint venture theory, plaintiffs must “plead facts giving rise to a plausible  
 17 inference that the appropriate elements are met.” *Griffin Aerosat*, 2010 WL 4580192, at  
 18 \*6. “Joint venture” does not stand as an independent claim for relief, and in the absence  
 19 of properly pled facts, is not an available theory of vicarious liability. *Id.*

20 Plaintiff does not allege an agreement between Kind Lending and Hegglin. (*See*  
 21 *id.*) Instead, Plaintiff contends that Kind Lending and Hegglin “act[ed] in concert” under  
 22 an alleged agreement between Kind Lending and Broker Solutions. (*Id.*) Thereafter,  
 23 Plaintiff merely recites the elements of a joint venture. (*Id.*) Typically, a complaint must  
 24 expressly set forth facts to give rise to a “plausible inference” of a joint venture. *Griffith*  
 25 *Aerosat*, 2010 WL 4580192, at \*6. As alleged, the facts give rise to an assuredness that a

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26  
 27 <sup>1</sup> The Court also notes that Plaintiff’s TAC is unclear as to against whom she asserts  
 28 what theory of liability and how such theory may be supported. Although Plaintiff  
 heeded the Court’s advice to be “abundantly clear” about which claims she brings against  
 which Defendants (Doc. 66 at 10 n.2), she has overlooked that advice with respect to how  
 the alleged agency relationships coalesced.



1 joint venture did not exist. *See id.* Therefore, Plaintiff's joint venture "claim" fails.

2 Ultimately, because Plaintiff has not plead sufficient facts to sustain a direct or  
3 vicarious liability claim for violation of the ACFA against Kind Lending, the Court will  
4 grant Kind Lending's Motion to Dismiss.

### 5 **B. Hegglin's Motion to Dismiss**

6 The Court has twice dismissed Plaintiff's TILA claims against Barrett Financial,  
7 the loan originator. (Docs. 51 & 66.) Now, in her TAC, Plaintiff alleges that Hegglin  
8 violated the TILA Regulation Z by "failing to timely disclose the increased costs of the  
9 Loan Transaction." (Doc. 68 at 20–21 ¶ 109.) Hegglin contends that because the TILA  
10 claim Plaintiff makes does not apply to non-creditors like Hegglin, her claim fails as a  
11 matter of law. (Doc. 76 at 4.) Plaintiff did not submit a brief in response.

12 TILA is a consumer protection statute that seeks to "avoid the uninformed use of  
13 credit." 15 U.S.C. § 1601(a). "TILA requires that lenders provide certain disclosures to  
14 borrowers reflecting the terms of the legal obligation between the parties." *Soriano v.*  
15 *Countrywide Home Loans, Inc.*, No. 09-CV-02415-LHK, 2011 WL 2175603, at \*6 (N.D.  
16 Cal. June 2, 2011). The *creditor* is the liable party. *See Garcia v. Fannie Mae*, 794 F.  
17 Supp. 2d 1155, 1168–70 (D. Or. 2011) (finding pursuant to 15 U.S.C. § 1640(a), only  
18 creditors can be held liable for monetary penalties or an award of attorneys' fees for  
19 TILA violations, while, in contrast, 15 U.S.C. § 1641(c) provides a right to rescind  
20 against a creditor's assignee).

21 Plaintiff alleges that "[l]oan officer [Hegglin] violated the TILA Regulation Z by  
22 failing to timely disclose the increased cost of the loan transaction under 12 C.F.R.  
23 § 1026.17(f). (Doc. 68 at 20–21 ¶¶ 109–10.) 12 C.F.R. § 1026.17(f) mandates that  
24 "*creditor[s]* shall disclose" certain changes in the terms before consummation.  
25 (Emphasis added.) Previously, the Court dismissed Plaintiff's TILA claim because she  
26 asserted it against Barrett, a non-creditor loan originator who bore no liability under the  
27 pleaded TILA provisions. (Doc. 51 at 5 (citing 15 U.S.C. § 1640).) Plaintiff's TAC is  
28 similarly deficient as it does not plausibly allege that Hegglin is the creditor, nor does it

1 assert a legal claim under an applicable TILA provision. *See* 12 C.F.R. § 1026.17.  
 2 Moreover, Plaintiff’s proffered case law to prove that Hegglin is the correct target for her  
 3 claim is inapposite as they dealt with actions against creditors, not loan officers. *See*  
 4 *DeMando v. Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000) (allowing Plaintiff to proceed  
 5 in a TILA claim asserted against a *creditor*); *Balderas v. Countrywide Bank, N.A.*, 664  
 6 F.3d 787, 789 (9th Cir. 2011) (same); *Abubo v. Bank of N.Y. Mellon*, 977 F. Supp. 2d  
 7 1037, 1044 (D. Haw. Oct. 15, 2013) (same). Plaintiff has again asserted a TILA claim  
 8 against a party not liable under the plead statutory provisions. Therefore, Plaintiff’s  
 9 claim fails as a matter of law.

### 10 **C. Plaintiff’s Rule 60 Motion**

11 Plaintiff moves for relief from this Court’s prior Orders under Rule 60(b)(1)  
 12 and (2). Rule 60(b) provides mechanisms for relief from a judgment or order in certain  
 13 scenarios, including: “(1) mistake, inadvertence, surprise, or excusable neglect; [or] (2)  
 14 newly discovered evidence that, with reasonable diligence, could not have been  
 15 discovered in time to move for a new trial under Rule 59(b).” Fed. R. Civ. P. 60(b); *see*  
 16 *also Sch. Dist. No. 1J, Multnomah Cty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.  
 17 1993). The moving party bears the burden of proving the existence of a basis for Rule  
 18 60(b) relief. *Cassidy v. Tenorio*, 856 F.2d 1412, 1415 (9th Cir. 1988). Although the  
 19 moving party’s factual allegations are accepted as true, “mere legal conclusions, general  
 20 denials, or simple assertions are insufficient to justify overturning the underlying  
 21 judgment.” *Campbell v. Garza*, No CV 21—2231-PHX-2231-JAT (CBD), 2022 WL  
 22 1131094, \*1 (D. Ariz. Apr. 15, 2022).

#### 23 *1. Timeliness*

24 Barrett asserts that Plaintiff’s Rule 60 Motion is untimely because it was filed  
 25 outside of the fourteen-day period prescribed for the filing of motions for reconsideration  
 26 under LRCiv 7.2(g). (Doc. 94 at 12.) Plaintiff does not make any discernible argument  
 27 in response; however, the Court disagrees with Barret. The District Court has discussed  
 28 the interplay between Rule 60(b) and LRCiv 7.2(g) in at least one instance. In *McPhatter*

1 *v. Ryan*, No. CV–11–8147–PCT–RCB(JFM), 2013 WL 428280, \*2 (D. Ariz. Feb. 4,  
 2 2013), the plaintiff moved for unspecified relief from a default judgment long after the  
 3 fourteen-day period for motions for reconsideration under LRCiv 7.2(g) and the twenty-  
 4 eight-day period for amending judgments under Federal Rule of Civil Procedure 59(e).  
 5 *Id.* As a result, the Court considered the “[n]ature of [the] [m]otion” to discern which  
 6 time limitations applied. *Id.* Because plaintiff sought to have his case “reopen[ed]” and  
 7 “reconsider[ed],” and because defendant challenged the motion under Rule 60(b)(1), the  
 8 Court found plaintiff’s motion to be a request for relief under Rule 60. Thus, the Court  
 9 applied the timing requirements in Rule 60(c)(1), not LRCiv 7.2(g). *Id.* at \*3. While the  
 10 Court is keenly aware of attempts to disguise one motion for another to relitigate and  
 11 obtain relief on settled issues, this is no such attempt. *See e.g., United States v.*  
 12 *Washington*, 653 F.3d 1057, 1060–61 (9th Cir. 2011) (discussing successive 28 U.S.C.  
 13 § 2255 motions masqueraded as Rule 60 motions). Despite some unclarity, Plaintiff’s  
 14 Motion specifies that she seeks relief under Rule 60(b)(1) and (2). (Doc. 84 at 8, 19.)  
 15 Therefore, Plaintiff is subject to the timing requirements of Rule 60(c)(1) and not LRCiv  
 16 7.2(g).

17 Because Plaintiff seeks relief under Rule 60(b)(1) and (2), her Motion must have  
 18 been filed “no more than a year after the entry of the judgment or order or date of the  
 19 proceeding.” Fed. R. Civ. P. 60(c)(1). Although the Court can discern that Plaintiff is  
 20 moving under Rule 60, the scope of the relief she seeks is somewhat unclear and  
 21 inconsistent. Plaintiff first asks this Court to “vacate the Order dismissing Broker  
 22 Solutions, and Barrett Financial and plaintiffs [sic] state law claims.” (Doc. 84 at 1.)  
 23 Plaintiff then concludes with a request that the Court “vacate its *orders* of dismissal and  
 24 grant [Plaintiff] leave to amend her complaint to allege TILA and state claims more  
 25 specifically with the new evidence.” (*Id.* at 22 (emphasis added).) And throughout her  
 26 Motion, Plaintiff’s request seemingly concerns the Court’s July 28, 2023 Order (Doc. 51)  
 27 and March 3, 2024 Order (Doc. 66), both of which dismissed various claims and granted  
 28 Plaintiff leave to amend. Plaintiff filed her Rule 60 Motion on June 4, 2024, making her

1 request timely as to each order.

2 2. Rule 60(b)(1)

3 The Supreme Court recently clarified that Rule 60(b)(1) covers “all mistakes of  
4 law made by a judge.” *Kemp v. United States*, 596 U.S. 528, 534 (2022) (“[I]n its legal  
5 usage, ‘mistake’ includes errors ‘of law or fact.’ Thus, regardless whether ‘mistake’ in  
6 Rule 60(b)(1) carries its ordinary meaning or legal meaning, it includes a judge’s  
7 mistakes of law.” (internal citation omitted)). And, courts have otherwise long held Rule  
8 60(b) relief is proper where a judge has erred in law. *See, e.g., Liberty Mut. Ins. Co. v.*  
9 *E.E.O.C.*, 691 F.2d 438, 441 (9th Cir. 1982) (“The law in this circuit is that errors of law  
10 are cognizable under Rule 60(b).” (citing *Gila River Ranch, Inc. v. United States*, 368  
11 F.2d 354, 356 (9th Cir. 1966))).

12 Plaintiff argues that the Court erred when it dismissed Barrett after it held that her  
13 ACFA claim was merely a repackaged TILA claim (Doc. 66 at 6), because Plaintiff can  
14 plead multiple claims under a single set of facts. (Doc. 84 at 19–20.) In support of her  
15 position, Plaintiff contends that the Court misinterpreted *Cel-Tech Commc’ns, Inc. v. Los*  
16 *Angeles Cellular Tel. Co.*, 973 P.2d 527 (Cal. 1999), to conclude reusing the facts  
17 underpinning her TILA claim to support her ACFA claim was impermissible. (*See* Doc.  
18 66 at 6.) Barrett simply maintains that the Court’s prior dismissal was justified. (Doc. 94  
19 at 11.)

20 In *Cel-Tech*, the California Supreme Court considered, among other things,  
21 whether a plaintiff could effectively “‘plead around’ an ‘absolute bar to relief’ simply ‘by  
22 recasting the cause of action’” for another. 973 P.2d at 541 (quoting *Manufacturers Life*  
23 *Ins. Co. v. Superior Court*, 895 P.2d 56, 71 (Cal. 1995)). The California high court  
24 answered that inquiry in the negative—that is, plaintiff’s may not “relabel[] the nature of  
25 the action” to skirt immunity. *Id.* (quoting *Rubin v. Green*, 847 P.2d 1044, 1053–54 (Cal.  
26 1993) (“If the policies underlying [a law] are sufficiently strong to support an absolute  
27 privilege, the resulting immunity should not evaporate merely because the plaintiff  
28 discovers a conveniently different label for pleading what is in substance an identical

1 grievance arising from identical conducted as that protected by [that law].”)) Here,  
 2 however, Plaintiff argues that no such immunity precludes Barrett from being liable  
 3 under the ACFA for alleged acts that would be violative of the TILA. (Doc. 84 at 20–21;  
 4 Doc. 91 at 8–9.) And, Plaintiff contends that, while TILA preempts liability for creditors  
 5 from state disclosure requirements incongruent to the TILA, it does not preempt claims  
 6 under state statutes prohibiting unfair or deceptive practices, like the ACFA. (Doc. 84 at  
 7 21 (citing *Peel v. Brooks Am. Mortgage Corp.*, 788 F. Supp. 2d 1149, 1158–59 (C.D. Cal.  
 8 2011); *Baker v. Aegis Wholesale Corp.*, 2010 WL 2853915, at \*6 (N.D. Cal. July 21,  
 9 2010)).)

10 The Court generally agrees with Plaintiff’s premise—a party may plead multiple  
 11 causes of action under a single set of facts so long as no extraneous forces, such as  
 12 immunity, are at play. Thus, if a plaintiff asserted that a defendant’s actions violated both  
 13 an inapplicable federal statute and an applicable state statute, the action should be  
 14 allowed to proceed on the state claim. Although, the Court disagrees with Plaintiff’s  
 15 view on how this Court employed *Cel-Tech*, as it cited the case for the proposition that  
 16 disguising a factually deficient claim as another cannot revive the claim. In fact, the  
 17 Court’s analysis when it dismissed the FAC and the SAC primarily targeted Plaintiff’s  
 18 failure to put forth more than mere conclusions of law to support that Barrett violated the  
 19 TILA or the ACFA. (See Doc. 51 at 4–5; Doc. 66 at 6.)

20 The Court fails to see an error of law in either prior Order with respect to Barrett,  
 21 although it endeavors to clarify why the allegations in Plaintiff’s SAC were insufficient  
 22 to establish an ACFA claim against the company. As discussed, to have a valid ACFA  
 23 claim, a plaintiff must show that there was “(1) a false promise or misrepresentation  
 24 made in connection with sale or advertisement of merchandise, and (2) consequent and  
 25 proximate injury.” *Stratton*, 2008 WL 2039313, at \*7. “[T]he misled consumer must  
 26 have suffered some damage as a result of the misrepresentation.” *Nataros*, 612 P.2d at  
 27 504 (footnote omitted). And notably, TILA is only preempted where “state consumer  
 28 fraud legislation . . . [is] ‘inconsistent’ with the terms required by TILA.” (Doc. 66 at 6–

7 (citing *Newbeck v. Wash Mut. Bank*, No. 09–1599, 2010 WL 291821, at \*3 (N.D. Cal., Jan 19, 2010)).); *see also Peel v. Brooks America Mortg. Corp.*, 788 F. Supp. 2d 1149, 1158–59 (C.D. Cal. 2011) (state law mortgage fraud claims not preempted by TILA).

The Court previously found that “Plaintiff[’s] attempt[] to apply liability for the disclosure violations, covered by 15 U.S.C. § 1639, into § 1639(b)(1) is not supported.” (Doc. 51 at 5.) The Court went on to hold that the TILA *duty definition* could not be substituted into an ACFA claim to support a state law cause of action. (Doc. 66 at 6.) In other words, the Plaintiff could not rely on allegations directed at establishing liability under federal law as a crutch to support a state law claim. (*See id.*) Reexamining Plaintiff’s SAC, she alleged that Barrett, through Hegglin, violated that ACFA by failing to timely disclose the increased cost of the loan prior to closing. (Doc. 52 at 18 ¶ 95.) Plaintiff then asserted that Barrett, through Hegglin, failed in its duty of care “for mortgage originators as implemented by Regulation Z under 15 U.S.C. 1639(b)(1)(A).” (*Id.* ¶ 96.) There is little else in the SAC that speaks to Barrett’s actions as being violative of the ACFA. (*See generally id.*) Even if Plaintiff could have utilized the same set of facts to mold an ACFA out of actions that would violate the TILA if lodged against an appropriate defendant, she repeatedly failed to do so. Instead, Plaintiff asserts conclusory allegations that Barrett is liable under the ACFA because its actions would violate the specific duty prescribed under the TILA.

This is a pleading approach that has been aptly characterized as a type of shotgun pleading that “does not commit the mortal sin or re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action.” *Weiland v. Palm Beach Cty. Sheriff’s Off.*, 792 F.3d 1313, 1322–23 (“The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.”). At bottom, the Court’s citation to *Cel-Tech* to partly express the issues with Plaintiff’s SAC was not an error of law within the ambit of Rule 60(b)(1).



Moreover, after reviewing the SAC under Rule 12(b)(6), it is rife with conclusory allegations that demanded dismissal.<sup>2</sup>

### 3. Rule 60(b)(2)

Rule 60(b)(2) provides allows the Court to relieve a party from the effects of a prior Order when it presents “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).” The plain terms of the Rule establish two predicate circumstances to move for such relief—there must have been a trial, and the evidence must have been unavailable within the period to move for a new trial under Rule 59(b). *Marroquin v. City of Los Angeles*, 112 F.4th 1204, 1215 (9th Cir. 2024) (“Our analysis thus begins—and ends—with the plain language of Rule 60(b)(2).”); *see also* Fed. R. Civ. P. 59(b) (“A motion for a new trial must be filed no later than 28 days after the entry of judgment.”); *cf. Protective Life Ins. Co. v. Mizioch*, No. CV10–1728–PHX–JAT, 2012 WL 3655354, \*4–5 (D. Ariz. Aug. 27, 2012) (applying Rule 60(b)(2) on a motion for summary judgment (citing *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (applying Rule 60(b)(2) on a *post-trial* motion))). Plaintiff seeks relief from two prior pre-trial Orders on motions to dismiss. Thus, because Rule 60(b)(2) provides relief only after a trial has occurred, Plaintiff’s request is outside the ambit of what the Rule allows the Court to consider.

Even if the Court considered the merits of Plaintiff’s Motion, she has not established that Mr. Andrew Pizor, an expert who “regularly communicate[s] with consumer-rights attorneys” and “monitor[s] court cases . . . around the country,” was

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<sup>2</sup> Plaintiff also contends that she has been unfairly prejudiced by an alleged delay in discovery. (Doc. 84 at 6–7.) It is unclear whether Plaintiff is simply stating this or arguing that the alleged prejudice warrants relief under Rule 60(b)(1) or (2). In any event, Plaintiff’s claimed prejudice allegedly flows from opposing counsels’ unwillingness to engage discovery, which, in Plaintiff’s own words, “unfairly burdened [her] to respond to Motions to Dismiss without the benefit of any discovery relative to the very specific alleged violations of TILA and the ACFA.” (*Id.* at 7.) Additionally, Plaintiff asserts that the Court’s failure to order a Rule 16 conference and facilitate discovery addled the inflicted prejudice in this “two-year merry-go-round of Motions to Dismiss.” (*Id.*) As discussed above, discovery is not to be used as a fishing expedition to ameliorate the fatal issues in a deficiently plead complaint. *Rodriguez*, 2010 WL 1644695, at \*2. Additionally, Plaintiff does not cite, or otherwise apprise the Court of, what legal authority demands relief in the face of the alleged suffered prejudice. Thus, Plaintiff’s claim falls flat.



1 unavailable or otherwise undiscoverable such that his report constitutes diligently sought  
 2 “newly discovered evidence” under Rule 60(b)(2). *See* 11 Charles A. Wright, et al.  
 3 Wright & A.Miller, Federal Practice & Procedure: Civil § 2859 (3d ed.) (“[T]he failure to  
 4 locate a witness prior to trial, who the movant later argues was important to the case, will  
 5 be treated as a lack of due diligence.”); *see also* *Wallis v. J.R. Simplot Co.*, 26 F.3d 885,  
 6 892 n.6 (9th Cir. 1994) (noting that evidence is not newly discovered if it “could have  
 7 been discovered with reasonable diligence” at the time of summary judgment); *Fisher v.*  
 8 *Kadant, Inc.*, 589 F.3d 505, 513–14 (1st Cir. 2009) (denying Rule 60(b)(2) relief where  
 9 consumers could not show why they could not have obtained evidence regarding  
 10 defective products earlier); *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d  
 11 1195, 1200–01 (5th Cir. 1993). In fact, Plaintiff seemingly could have retained Mr. Pizor  
 12 prior to the outset of this litigation, as she filed suit in May 2022, and his opinion is  
 13 related only to the payments included in the May 2021 TILA disclosure. (*See* Doc. 1 at 6  
 14 ¶ 27.)

15 Additionally, Plaintiff contends that “it is illogical to assume that Plaintiff could  
 16 be aware of [the Consent Decrees]” because they were published after the *original*  
 17 Complaint, and Plaintiff’s counsel only discovered how the Decrees evidenced Kind  
 18 Lending and Broker’s deceptive conduct during the drafting of the TAC. (Doc. 84 at 9.)  
 19 The Consent Decrees were published in September 2022 and January 2023. (Doc. 68-1  
 20 at 17, 26.) Interestingly, Plaintiff’s SAC, which references the Consent Decree against  
 21 Kind Lending, was filed August 7, 2023. (Doc. 52 at 4 ¶ 10.) Here, Plaintiff’s  
 22 contention is illogical because her argument does not track the allegations in her own  
 23 filings in this Court. Plaintiff’s sheer lack of diligence alone topples her attempt to paint  
 24 the Consent Decrees as “new evidence.” *Wallis*, 26 F.3d at 892 n. 6.

#### 25 4. Leave to Amend

26 In her Rule 60 Motion Plaintiff also moved for leave to amend her TAC to  
 27 “reallege her claims against all Defendants for violation of TILA, the ACFA, breach of  
 28 contract and fiduciary duties.” (Doc. 84 at 17.) “Leave to amend need not be given if a

complaint, as amended, is subject to dismissal.” *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court’s discretion to deny leave to amend is particularly broad where Plaintiff has previously been permitted to amend his complaint. *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). For the reasons discussed in this Order, as well as the Court’s March 2024 Order (Doc. 66), the Court will deny Plaintiff’s request for leave to amend as further attempts to amend the complaint would be futile.

#### **D. Motion for Sanctions**

Hegglin moves for Rule 11 sanctions because Plaintiff has asserted a TILA claim against a non-creditor for the third time. (Doc. 75 at 1.) Hegglin argues that this Court has twice ruled that TILA does not apply to non-creditors, and thus Plaintiff’s claim clearly disregards prior Orders. (*Id.* at 1–2.) In response, Plaintiff argues sanctions are unwarranted because TILA regulations allow claims against mortgage originators and the Court dismissed prior iterations of the TILA claims asserted against other Defendants, not Hegglin. (Doc. 82 at 2–3.)

The “central purpose of Rule 11 is to deter baseless filings.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). Where “a complaint is the primary focus of a Rule 11 proceeding, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it.” *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (quoting *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002)). “The complaint need not be wholly baseless to be sanctionable: A partially supported, partially unsupported filing may still be sanctionable.” *Lake v. Hobbs*, 643 F. Supp. 3d 989, 996 (D. Ariz. 2022) (citing *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362–65 (9th Cir. 1990) (“The relation of the allegedly frivolous claim to the pleading as a whole is thus a relevant factor, but the mere existence of one non-frivolous claim is not dispositive . . . .”)). “Nor does a subjective good faith belief provide safe harbor. Rule 11’s objective standard

1 eliminates the ‘empty-head pure-heart’ justification for frivolous arguments.” *Id.*  
2 (quoting *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994)). And, in assessing the pre-  
3 filing inquiry, “the court’s task is to determine ‘whether an attorney, after conducting an  
4 objectively reasonable inquiry into the facts and law, would have found the complaint to  
5 be well-founded.’” *Id.* (quoting *Holgate*, 425 F.3d at 677). Courts must consider “all the  
6 circumstances of a case,” *Cooter*, 496 U.S. at 401, “focusing on the information available  
7 when the paper is filed,” *Lake*, 643 F. Supp. 3d at 996 (citing *Golden Eagle Dist. Corp.*  
8 *v. Burroughs Corp.*, 801 F.2d 1531, 1538 (9th Cir. 1986)).

9 In prior Orders, the Court dismissed the TILA claims against Barrett (Doc. 51) and  
10 Kind Lending (Doc. 66) because neither Defendant were a creditor liable under the  
11 TILA. In Plaintiff’s TAC, she alleges Hegglin violated the TILA Regulation Z and 12  
12 C.F.R. § 1026.17(f) by failing to timely disclose the increased costs of the loan  
13 transaction. (Doc. 68 at 21 ¶ 110.) These provisions apply to creditors—which Hegglin  
14 is not. In her Response to the Motion for Sanctions, Plaintiff contends that the TILA  
15 applies to “mortgage originators” as well as creditors. (Doc. 82 at 2.) However, Plaintiff  
16 did not allege in the TAC that Hegglin violated those provisions or otherwise cite to the  
17 provisions therein creating a private right to action to sue Hegglin. (*See* Doc. 68.)

18 Although Plaintiff has still not asserted a sustainable claim for relief, this Court  
19 does not believe sanctions are appropriate. While federal courts are keenly aware of “the  
20 time and expense that . . . repeated filings of substantially identical complaints” costs  
21 both the parties and the tribunal, *Soto v. Bank of Am.*, No. 09–cv–03429–JAM–KJM,  
22 2010 WL 1779892, \*2 (E.D. Cal. Apr. 29, 2010), sanctions should be imposed “only in  
23 the most egregious situations, lest lawyers be deterred from vigorous representation of  
24 their clients.” *United Nat’l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir.  
25 2001) (citations omitted). This Court’s prior Orders dismissed TILA claims against other  
26 Defendants, not Hegglin. Now, posed with the task of refashioning her claims against the  
27 remaining Defendants, Plaintiff has advanced legal and factual claims against Hegglin  
28 that are best captured as insufficient, not baseless.

Put simply, Plaintiff has failed to plead sufficient facts and law to crest the hill and maintain a valid TILA claim against Hegglin. When a pleading or filing is not entirely successful, it does not automatically ascribe the quality “frivolous.” *See Gamble v. Kaiser Found. Health Plan., Inc.*, 348 F. Supp. 3d 1003, 1030 (N.D. Cal. 2018). And although this litigation has been replete with fraught attempts to sustain a TILA claim, failed attempts have not been summarily reasserted against the same Defendants. Therefore, the Court will deny Hegglin’s Motion for Sanctions (Doc. 75).

#### IV. CONCLUSION

Accordingly,

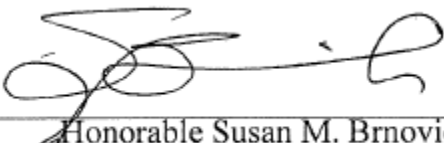
**IT IS HEREBY ORDERED** granting Defendant Kind Lending LLC’s Motion to Dismiss Count I of the TAC (Doc. 70) and Defendant John Claude Hegglin’s Motion to Dismiss Count II of the TAC (Doc. 76).

**IT IS FURTHER ORDERED** dismissing Kind Lending LLC from this case without prejudice.

**IT IS FURTHER ORDERED** denying Plaintiff Bonnie Creech’s Rule 60 Motion for Relief & Leave to Amend (Doc. 84).

**IT IS FURTHER ORDERED** denying Defendant John Claude Hegglin’s Motion for Rule 11 Sanctions (Doc. 75).

Dated this 25th day of October, 2024.

  
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Honorable Susan M. Brnovich  
United States District Judge